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NO. 82-160

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1981

HORACE CLIFTON JONES,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

STEVEN HERSHEY SWANDER
PRICE & SWANDER
409 Sinclair Building
Fort Worth, Texas 76102
(817) 338-4633

ATTORNEYS FOR PETITIONER

July 13, 1982

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether there was substantial evidence presented to prove Petitioner guilty as a causer of the interstate transportation of a stolen tractor by stating he was a potential buyer for the tractor.

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The Petitioner, HORACE CLIFTON JONES, also known as BUSTER JONES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 15, 1982.

## OPINIONS OF COURTS BELOW

This case proceeded to trial in the United States District Court for the Northern District of Texas. No formal opinion was rendered by that Court. The written opinion of the United States Court of Appeals for the Fifth Circuit reported at 673 F2d 115 is contained in the Appendix to this Petition.

## JURISDICTION

Petitioner seeks to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction as to Count I of the Indictment charging causing of the interstate transportation of a stolen tractor entered on April 15, 1982. A timely Petition for Rehearing was denied by written order of the United States Court of Appeals for the Fifth Circuit on May 18, 1982. This Petition for Certiorari is sought pursuant to 28 U.S.C. 1254(1).

## CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

### TITLE 18 SECTION 2(a) and (b)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

### TITLE 18 U.S.C. 2312

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

## TITLE 18 U.S.C. 2313

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

In late November, 1979, CHUCK JORDAN stole a Massey Ferguson tractor in Oklahoma City, Oklahoma, and transported it to Fort Worth, Texas (Tr., Vol. 1, pp. 76-77). JORDAN had previously, in early November, purchased a pick-up truck from HORACE CLIFTON JONES (Tr., Vol. 1, pp. 76-77, Government's Exhibit 3). About the time of the purchase of the truck, JORDAN testified that he asked JONES if he would be interested in buying a tractor (Tr., Vol. 1, pp. 78, 154): "Well I asked him if he was interested in a tractor, and he said yes. And I said I had one located and I'd bring it down, and he said bring it down, that he'd buy it, sell it, or get rid of it." (Tr., Vol. 1, p. 78).

JORDAN testified that JONES furnished him a trailer which he used to haul the stolen tractor to Fort Worth, Texas (Tr., Vol. 1, pp. 79, 84, 154). Prior to hauling the stolen tractor to Fort Worth, JORDAN stated that he called JONES by telephone: "Well I called him and I told him that I had one located and I'll bring it down. He

said to bring it down." (Tr., Vol. 1, p. 83). JORDAN stated that the cash purchase price for the tractor was to be FIVE THOUSAND DOLLARS ($5,000.00) (Tr., Vol. 1, p. 84).

Finally, JORDAN related that the reason he stole the tractor and brought it to JONES' place of business in Fort Worth was because JONES indicated he might buy it (Tr., Vol. 1, p. 139).

The Statement of Facts reveals that the conversations between JORDAN and JONES were about the potential purchase of a tractor, not that JONES was told this was to be a stolen tractor. That JONES knew the tractor was to be stolen is only by implication. The language testified to by JORDAN does not indicate a fixed deal or promise on the part of JONES to purchase the tractor. Of course, at the time of the calls, JONES had not seen the tractor, and the inference that there was a promise to purchase the tractor for FIVE THOUSAND DOLLARS ($5,000.00) without seeing it is strained.

A complete statement of facts is given in the reported opinion of the United States Court of Appeals contained in the Appendix.

At this stage, Petitioner seeks relief only from the conviction of causing the interstate theft of a motor vehicle pursuant to 18 U.S.C. 2312, which statute provides part of the initial jurisdiction of the United States District Court for the Northern District of Texas.

## REASONS FOR GRANTING THE WRIT

Petitioner has been convicted of inducing or causing the transportation of a stolen tractor in interstate commerce solely on the testimony of a five times previously convicted thief (Tr., Vol. 1, p. 74), who plead guilty as the principal in this case (Tr., Vol. 1, pp. 73-74, 81-82). This accomplice was described by the Court of Appeals as a "professional thief." United States v. Jones, 673 F2d 115, 118 (5th Cir. [1982]).

Petitioner's case presents a gross extension of the limits of 18 U.S.C. 2(b) covering the definition and proof of what constitutes a person a "causer" of a criminal act so as to hold one liable as a principal.

The circuit courts have required an actor to be a cause in fact with the requisite criminal intent to be liable under 18 U.S.C. 2(b). United States v. Ruffin, 613 F2d 408, 412 (2nd Cir. [1979]), United States v. Lester, 363 F2d 68, 73 (6th Cir. [1966]).

The Fifth Circuit holding that "The evidence is plainly sufficient to find beyond a reasonable doubt that JONES induced the accomplice to steal the vehicle in Oklahoma and transport it to JONES' place of business in Texas by promising in advance of the theft to buy the vehicle when the accomplice brought it to him in Texas," United States v. Jones, supra., 673 F2d at 117, is not consistent with the record or with the requirement that JONES be a causer in fact with criminal intent of the thief's actions.

Clearly, there is a limit to holding one liable for the acts of another when the other is a professional criminal with complete knowledge and control over what he is doing. While the usual application of 18 U.S.C. 2(b) is when the actor utilizes an "innocent agent" to perform the criminal act, it has been held that there is no requirement that the agent be innocent for the section to apply, United States v. Rapoport, 545 F2d 802, 806 (2nd Cir. [1976]), and that the guilt or innocence of the agent is irrelevant to the application to 18 U.S.C. 2(b), United States v. Ruffin, supra., 613 F2d at 413.

Still, there are logical limits to holding one liable as a causer without proven criminal intent when the perpetrator of the crime is in no sense innocent:

1. When the perpetrator of the crime (thief) is in control with knowledge of his actions, it is urged that his actions are in no real sense being caused by a person offering a potential benefit (purchase of property) of the crime. The thief would logically have committed the crime even without the offer or as soon as he found another potential buyer.

2. Assuming that a principal has knowingly agreed to purchase stolen property from his agent (thief), this is in legal contemplation a criminal conspiracy and the participants are not causing the others' actions, but agreeing to act together.

The Court of Appeals in this case has expanded the grasp of 18 U.S.C. 2(b) to include a potential buyer from a professional thief. Unquestionably, a person may be guilty of receiving stolen property with knowledge pursuant to 18 U.S.C. 2313. However, since a receiver is not going to be liable as a causer of the thief's actions, United States v. Beck, 615 F2d 441 (7th Cir. [1980]), United States v. Gallagher, 565 F2d 981 (7th Cir. [1977]), it seems patently unjust to hold a potential receiver liable as a causer and without allegation and proof of conspiracy.

It is undoubtedly important that parameters of criminal conduct be definitely stated, and this Court should exercise its supervisory authority to limit the unbridled use of 18 U.S.C. 2(b) to prevent abuse by the Government through expanded prosecution of "causers" for persons who are outside the scope of criminal laws relating to their specific conduct. Petitioner has fallen victim to such abuse.

Petitioner recognizes that JORDAN (the thief) testified that JONES furnished him with a trailer to help transport the tractor. JORDAN'S testimony was thought to be fabricated by the Court of Appeals, United States v. Jones, supra., 673 F2d at 121, and it did not hold JONES liable as a knowing aider pursuant to 18 U.S.C. 2(a). The conviction of JONES in Count I of the Indictment for causing the interstate transportation of a stolen vehicle was based solely on the uncorroborated and

unreliable testimony of CHUCK JORDAN, the accomplice thief. The unreliability and lack of corroboration as to the elements of the offense charged are detailed in the opinion of the Court of Appeals.

## CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

PRICE & SWANDER

By Steven Hershey Swander
STEVEN HERSHEY SWANDER

409 Sinclair Building
Fort Worth, Texas 76102
(817) 338-4633

ATTORNEYS FOR PETITIONER

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CERTIFICATE OF SERVICE

I, STEVEN HERSHEY SWANDER, do hereby certify that on this the 13th day of July, 1982, I served a copy of the foregoing Petition for Writ of Certiorari on:

Solicitor General
Department of Justice
Washington, D.C. 20530

by mailing same by certified mail, postage prepaid, to such attorney at the above address.

SIGNED at Fort Worth, Texas, on this the 13th day of July, 1982.

Steven Hershey Swander

STEVEN HERSHEY SWANDER

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

DEFENDANT: HORACE CLIFTON JONES, also known as Buster Jones

Docket No. CR4-81-26

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: 6-19-81

COUNSEL: ___ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL employed - Steve Swander

PLEA: ___ GUILTY, and the court being satisfied that there is a factual basis for the plea,

___ NOLO CONTENDRE,

_X_ NOT GUILTY.

There being a verdict of: ___ NOT GUILTY. Defendant is discharged

_X_ GUILTY as to Counts 1,2

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of Interstate Transportation Stolen Motor Vehicle and Sale of Stolen Motor Vehicle transported in Interstate Commerce; in violation of Title 18, United States Code, Section 2312, 2313.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment

should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on Count 1, and four (4) years on Count 2.

IT IS FURTHER ORDERED that the execution of sentence on Count 2 of the indictment is hereby suspended, and the defendant is placed on probation for a period of four (4) years such period to run consecutive to the term of imprisonment imposed on Count 1.

SPECIAL CONDITIONS OF PROBATION:

ADDITIONAL CONDITIONS OF PROBATION: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends, defendant be committed at FCI, Fort Worth, Texas.

SIGNED BY:

X U.S. District Judge

____ U.S. Magistrate

/S/
DAVID O. BELEW, JR.

DATE: _____

UNITED STATES of America,
Plaintiff-Appellee,

v.

Horace Clifton JONES, a/k/a Buster
Jones, Defendant-Appellant.

No. 81-1275.

United States Court of Appeals,
Fifth Circuit.

April 15, 1982.

Defendant was convicted before the United States District Court for the Northern District of Texas, David O. Belew, Jr., District Judge, of causing a stolen motor vehicle to be transported in interstate commerce and of receiving and concealing motor vehicle in question, and he appealed conviction on count of causing interstate transportation of vehicle. The Court of Appeals, Tate, Circuit Judge, held that : (1) failure to give accomplice instruction was not plain error simply because, if requested, district court's failure to do so would have been reversible error; (2) circumstance that accomplice was five-times-convicted felon was not sort of unreliability contemplated to elevate to plain error status trial court's failure to instruct on accomplice testimony sua sponte, especially where instructions adequately instructed jury relating to effect of such prior convictions on accomplice's credibility; and (3) although Government principally relied upon testimony of alleged accomplice, who had pleaded guilty and was cooperating government witness, to prove defendant's pretheft involvement in causing interstate transportation

of vehicle, failure to give cautionary accomplice instruction sua sponte was not plain error where other instructions adequately cautioned jury to consider carefully before accepting five-times-convicted accomplice's testimony, and frequent telephone calls to defendant by accomplice, a comparative stranger, immediately prior to theft were by numbers sufficiently corroborative of accomplice's testimony.

Affirmed.

1. Automobiles 355(12)

In prosecution for causing interstate transportation of stolen motor vehicle, evidence permitted jury finding that defendant induced accomplice to steal vehicle in Oklahoma and to transport it to defendant's place of business in Texas by promising in advance of theft to buy vehicle when accomplice brought it to him in Texas. 18 U.S.C.A. § 2312.

2. Criminal Law 1038.2, 1038.3

Generally, failure of district court to afford instruction to jury cannot be complained of on appeal in absence of request or objection by counsel in trial court. Fed.Rules Cr.Proc. Rule 30, 18 U.S.C.A.

3. Criminal Law 1038.2

Failure to give instruction in absence of request for it may amount to plain error only in egregious instances. Fed.Rules Cr.Proc. Rules 30, 52(b), 18 U.S.C.A.

4. Criminal Law 1038.2

Failure to give accomplice instruction is not plain error simply because, if requested, district court's

failure to do so would have been reversible error. Fed. Rules Cr.Proc. 30, 52(b), 18 U.S.C.A.

5. Criminal Law 1038.2

When defendant contends failure to give instruction was plain error, he must demonstrate that charge, considered as whole, was so deficient as to result in likelihood of grave miscarriage of justice or he must show exceptional circumstances in which errors are obvious or otherwise seriously affect fairness, integrity, or public reputation of judicial proceedings. Fed.Rules Cr.Proc. Rules 30, 52(b), 18 U.S.C.A.

6. Criminal Law 1038.2

Plain error may result from failure to give accomplice instruction, under circumstances of either uncorroborated plus unreliable testimony of accomplice or close issue as to guilt, if, on reading record as whole, reviewing court is convinced that, under particular facts, substantial injustice may have resulted from failure expressly to alert jury to danger of relying upon testimony of accomplice. Fed.Rules Cr.Proc. Rules 30, 52(b), 18 U.S.C.A.

7. Criminal Law 1038.2

Circumstance that accomplice was five-times-convicted felon was not sort of unreliability as would elevate to plain error status trial court's failure to instruct on accomplice testimony sua sponte, especially where instructions adequately instructed jury relating to effect of such prior convictions on accomplice's credibility. Fed.Rules Cr.Proc. Rules 30, 52(b), 18 U.S.C.A.

8. Criminal Law 1038.2

Although Government relied principally upon testimony of defendant's alleged accomplice, who had pleaded guilty and was cooperating government witness, to prove defendant's pretheft involvement in causing interstate transportation of stolen motor vehicle, failure to give cautionary accomplice instruction sua sponte was not plain error where other instructions adequately cautioned jury to consider carefully before accepting five-times-convicted accomplice's testimony, and frequent telephone calls to defendant by accomplice, a comparative stranger, immediately prior to theft were by numbers sufficiently corroborative of accomplice's testimony. 18 U.S.C.A. §2312; Fed.Rules Cr.Proc. Rules 30, 52(b), 18 U.S.C.A.

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Steven H. Swander, Fort Worth, Tex., for defendant-appellant.

Ronald C. H. Eddins, Asst. U.S. Atty., Fort Worth, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

[1] The defendant Jones was convicted of causing a stolen motor vehicle to be transportated in interstate commerce, 18 U.S.C. §2312 (Count 1), and of receiving and concealing the motor vehicle in question, 18 U.S.C. § 2313 (Count 2). He was sentenced to four years' imprisonment

on both counts, but his sentence on Count 2 was suspended. On his appeal, Jones attacks only the conviction on Count 1 (causing the interstate transportation of the stolen motor vehicle). His arguable contention in this regard is that the district court committed plain error by failing to give a cautionary instruction (although not requested to do so) against conviction upon the uncorroborated testimony of an alleged accomplice, who was a cooperating government witness.* Finding that, under the circumstances, the district court did not commit plain error by failing to give the accomplice instruction in the absence of request for it, we affirm.

The Issue Before Us

On the present record, little question arises that, after one Jordan (the alleged accomplice) had stolen a large tractor in Oklahoma City, Oklahoma, he brought the tractor directly to Jones in Fort Worth, Texas, who then had false bills of sale prepared for purposes of resale. For purposes of this appeal, it is essentially conceded that the evidence is open to the construction that Jordan

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* Jones also contends that the evidence was insufficent to support conviction. However, if the trial jury accepted the testimony of the alleged accomplice, the evidence is plainly sufficient to permit the jury to find beyond a reasonable doubt that Jones induced the accomplice to steal the vehicle in Oklahoma and to transport it to Jones' place of business in Texas, by promising in advance of the theft to buy the vehicle when the accomplice brought it to him in Texas.

brought the stolen vehicle directly to Jones in the expectation that Jones would buy or aid in the selling of a stolen vehicle. Nor for the present purposes do we reject Jones' argument that the circumstance that a thief may bring stolen goods to a dealer in them does not, by itself, prove that the dealer or "fence" instigated the theft and (in this case) the subsequent transportation of the stolen property across state lines.

On this appeal, Jones contends only that he was improperly convicted of causing the transportation of the stolen tractor from Oklahoma City to Fort Worth. That is, although Jones may have knowingly received the tractor after it was stolen, Jones notes that this does not by itself permit an inference that before the theft and delivery to him, he played any part in its theft or transportation across state lines. In this regard, Jones points out, the government's case is principally, if not entirely, based upon the testimony of Jordan, the alleged accomplice, as to the contents of private personal and telephone conversations between the two before and after the theft. Although the telephone company records do corroborate Jordan's testimony that the calls between the two did take place, the proof of the sinister content of the telephone calls depends upon the uncorroborated testimony of the accomplice Jordan. See United States v. Beasley, 519 F.2d 233, 241 (5th Cir. 1975). The evidence also shows that Jordan had been convicted of felony theft on five occasions other than the present incident, and a fair inference from the testimony is that Jordan was a professional thief of motor vehicles.

The defendant Jones contends that, under the circumstances, the trial court was required to give a cautionary instruction against placing too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to it, see Tillery v. United States, 411 F.2d 644, 647 (5th Cir. 1969), even though the defendant's counsel did not request this instruction.

The Legal Principle Relied Upon

The legal principle relied upon by the appellant Jones was summarized by us in United States v. Nabrit, 554 F.2d 247, 248-49 (5th Cir. 1977) as follows: "The failure to give an accomplice instruction may constitute plain error if the accomplice testimony is both uncorroborated and either incredible or unreliable, United States v. Beasley, 519 F.2d 233, 241 (5th Cir. 1975), vacated on other grounds, 425 U.S. 956, 96 S.Ct. 1736, 48 L.Ed.2d 201 (1976); Tillery v. United States, 411 F.2d 644 (5th Cir. 1969); Williamson v. United States, 332 F.2d 123 (5th Cir. 1964), or if evidentiary questions are so close as to require a cautionary instruction. United States v. Windom, 510 F.2d 989, 994 (5th Cir.), cert. denied, 423 U.S. 863, S.Ct. 121, 46 L.Ed.2d 91 (1975); United States v. Clark, 480 F.2d 1249, 1254 (5th Cir.), cert. denied, 414 U.S. 978, 94 S.Ct. 301, 38 L.Ed.2d 222 (1973); Davis v. United States, 411 F.2d 1126, 1129 (5th Cir. 1969)."

Based upon these decisions, skillful counsel for the defendant Jones argues that whenever a conviction is essentially based upon the testimony of an accomplice - and either (1) that testimony is both uncorroborated and

incredible or unreliable, or (2) the evidence as to guilt or innocence is close - "plain error" invariably results, unless the trial court (even in the absence of request) specially instructs the jury to receive such accomplice testimony with caution and to require corroboration of it. We do not read the jurisprudential principle enunciated by the cited decisions - only Tillery and Williamson of which in fact resulted in reversals - to apply with such stringency, although indeed plain error "may" result under such circumstances.

[2] In the first place, the usual rule is that the failure of the district court to afford an instruction to the jury cannot be complained of on appeal in the absence of request or objection by counsel in the trial court. Rule 30 Fed.R.Cr.P.; 2 Wright, Federal Practice & Procedure § 484 (1969). Here, for example, reversible error would have occurred if the dsistrict court had refused counsel's request for the accomplice instruction, see e.g., Dunn v. United States, 318 F.2d 89 (5th Cir. 1963); and, in the ordinary course of criminal trial, one would expect experienced counsel to request such an instruction should it be thought desirable to have this express instruction to alert the jury to the potential unreliability of the accomplice Jordan's testimony - an instruction additional to those here given that did instruct the jury, in weighing credibility, to consider a witness's relationship to the government, whether he had testified falsely concerning a material fact, and whether his credibility had been impeached by a previous conviction. The general purpose of Rule 30 is to require counsel to afford the district court an opportunity to

avoid error. 2 Wright, supra, § 484. In our opinion, the Tillery and Williamson "plain error" reversals were intended to remedy a potential substantial injustice under the facts of those particular cases, not to provide a general per se exception to the jurisprudential requirement that a trial request must be made for a jury instruction before the failure to give such may be the subject of complaint on appeal. Williamson and Tillery were not intended to permit counsel, by knowing inaction, to trap a trial court into reversible omission of instruction.

[3-5] In the second place, while Rule 52(b), Fed.R.Cr.P., permits reversal for "[p]lain errors or defects affecting substantial rights . . . , although not brought to the attention of the [trial] court," the failure to give an instruction in the absence of request for it may amount to plain error only in egregious instances, especially in view of Rule 30's unequivocal provision that such failure cannot be complained of on appeal in the absence of trial request or objection. That is, such a failure to give an accomplice instruction is not plain error simply because, if requested, the district court's failure to do so would have been reversible. When an appellant contends a failure to give an instruction was plain error, he "must demonstrate that the charge, considered as a whole" was so deficient "as to result in a likelihood of a grave miscarriage of justice," United States v. Varkonyi, 645 F.2d 453, 460 (5th Cir. 1981), or he must show "exceptional circumstances" where the "errors are obvious" or otherwise "seriously affect the fairness, integrity, or

public reputation of judicial proceedings," United States v. Adams, 634 F.2d 830, 836 (5th Cir. 1981). See also United States v. Thevis, 665 F.2d 616 at 645 (5th Cir. 1982). "The sounder perception is that when an appellate court should take notice of error not raised below must be made on the facts of the particular case." 3 Wright, supra, § 856 at p. 373.

We thus do not read Tillery and Williamson as erecting an invariable per se rule of plain error whenever the accomplice instruction is not given under the circumstances found to be reversible under the facts of those cases. In Williamson, in finding plain error, the court reviewed the entire record and found that the criminal cast to the defendant bank cashier's otherwise innocent (if negligent) conduct was based "entirely" upon the alleged accomplice's testimony. 332 F.2d at 127. Likewise, in Tillery - where the defendant businessman had allegedly helped an admitted burglar in the burglary of a neighboring store and had thereafter participated in the burglar's interstate transportation of the stolen goods - the burglar's tainted testimony at the trial was the only direct evidence, 411 F.2d at 646, connecting the defendant with the burglar's illegal conduct.

[6] We deduce from Williamson, Tillery, and the other decisions cited - not a rule mechanically requiring "plain error" reversal if certain criteria are met (i.e., either uncorroborated plus unreliable testimony of the accomplice, or a close issue as to guilt) - but instaed a principle that plain error may result under these circumstances if, on reading the record as a whole, the reviewing court is convinced that, under the particular

facts, a substantial injustice may have resulted from the failure expressly to alert the jury to the danger of relying upon the testimony of the accomplice. As stated in Tillery, "The failure to warn a jury about accomplice testimony is not reversible error in all instances. . . . It is the better practice, however, to caution the juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such testimony. [Nevertheless,] "[t]he warning is not an absolute necessity in all cases." 411 F.2d at 647 (emphasis supplied).

We have recently stated that the Tillery plain error situation does not arise unless the accomplice's testimony is "'incredible or insubstantial on its face,'" United States v. Hinds, 662 F.2d 362, 363, 371 (5th Cir. 1981). The generic situation contemplated by Tillery and Williamson is that, since a conviction may be sustained on the basis of the uncorroborated testimony of the accomplice (and therefore the court may not grant a motion for acquittal), the district court may be obliged to take special efforts to caution the jury against placing too much credence upon such uncorroborated accomplice testimony (1) where it is solely relied upon for conviction and (2) where there are strong indicia that the testimony of the accomplice may be a fabrication. For reasons to be stated, we do not find that, under the facts of the present case, plain error in this sense resulted from the district court's failure to give a cautionary accomplice instruction.

The Factual Context

On the weekend of November 24-25, 1979, Jordan (the alleged accomplice) stole the tractor in Oklahoma City and loaded it onto a trailer hitched to his pick-up truck. On the followng day, after Jordan drove directly with the tractor on the trailer to the defendant Jones' place of business in Fort Worth, certain papers (including false bills of sale) were filled out at Jones' direction. As earlier noted, the subsequent events undoubtedly amounted to corroborated proof that Jones knowingly received the stolen tractor (Count 2); but, as argued by the appellant Jones, this evidence as to post-delivery conduct by Jones does not (aside from the testimony of Jordan) necessarily constitute evidence that he had knowingly caused the prior interstate transportation (Count 1) - rather, this evidence proves only that he made efforts to conceal his post-delivery receipt of the stolen property.

To prove pretheft involvement by Jones - essential to proof of guilt under Count 1 that he had caused the interstate transportation of a stolen motor vehicle - the government did indeed rely principally upon the testimony of Jordan, the allged accomplice, who had pleaded guilty and was a cooperating government witness. The issue is whether that testimony was so unreliable and so uncorroborated in the Williamson-Tillery sense as to require the trial court, without request for it, to give a cautionary instruction to the jury that expressly instructed it to require corroborating evidence before giving credence to questionable testimony of this nature. This issue arises, however, in the context of general instructions that were intended to alert the jury that,

in weighing the putative accomplice Jordan's credibility, they could take into account any interest he himself might have arising out of his plea bargain with the government, as well as the reflection upon his truthfulness arising from his given prior felony-theft convictions.

As to Jones' pretheft involvement, Jordan testified as follows:

1. On November 9 (about three weeks before the theft), Jordan - in the course of purchasing a pick-up truck from Jones in Dallas - inquired if Jones would be interested in buying a tractor that Jordan had located in Oklahoma City. Jones replied that he was interested and that he would buy it or help Jordan sell it (for a commission), if Jordan brought it down.

2. At that time or later, Jones agreed to furnish Jordan a trailer to transport the tractor. The day before the theft, Jordan drove down to Fort Worth from Oklahoma City and picked up the trailer, returning it with the tractor after the theft. (At this point, we should note that, while Jordan did bring the trailer from Oklahoma City to Fort Worth, outside of his own testimony there is no evidence that prior to that time, the trailer had ever been in Fort Worth on Jones' premises, or that it had been furnished to Jordan by Jones before the theft. To the contrary, the former Jones' employees - who were testifying as government witnesses and who displayed some resentment toward Jones - testified that they had never seen the trailer on Jones' various business premises before Jordan brought the trailer with the tractor to Fort Worth.)

3. Shortly before the theft, Jordan telephoned Jones from Oklahoma City and told him he had located the tractor. Jones agreed to pay Jordan five thousand dollars cash for the tractor when the latter brought it to Fort Worth.

[7] In determining whether it was plain error under the present facts not to give the cautionary accomplice instruction, we first note that, unlike in Tillery and Williamson, the accomplice's unreliability here is not based on conflicting versions shifting the blame in the criminal incident or on cumulative pretrial and trial instances indicating error and confusion. See, e.g., United States v. Beasley, supra, 549 F.2d at 242-43. See also United States v. Hinds, supra, 662 F.2d at 370-71. Here, in the main, in his pretrial accounts the accomplice Jordan implicated Jones consistent with his trial testimony, and the alleged discrepancies are not material insofar as Jones' involvement. The circumstance that Jordan is a five-time convicted felon is not the sort of unreliability "contemplated by Williamson and Tillery to elevate to plain error status a trial court's failure to instruct on accomplice testimony sua sponte," Beasley, supra, 519 F.2d at 242, especially since the district court's instructions adequately instructed the jury relating to the effect of these prior convictions on the accomplice's credibility.

Nevertheless, we must admit that Jordan's most damaging testimony against Jones - that Jones had pretheft furnished him the trailer for his use in it - is open to strong imputations of fabrication, although consistent with Jordan's pretrial statements. The

furnishing of the trailer is supported only by Jordan's uncorroborated and somewhat questionable testimony and is, if anything, contradicted by the testimony of all other witnesses who were questioned about the trailer, including the government's. We are left with the impression that this aspect of Jordan's consistent version of the incident may have been a fabrication designed to shield a friend who had furnished him the trailer in Oklahoma City, an implication well developed by the cross-examination of Jordan by Jones' able counsel.

[8] Ultimately, however, we determine that, on the record as a whole, plain error did not occur in the Williamson-Tillery sense, not only because the other instructions given adequately under the circumstances cautioned the jury to consider carefully before accepting the five-times-convicted Jordan's testimony, but also because there is at least some slight objective corroboration to Jordan's version implicating Jones in pretheft association prior to the actual theft of November 25-26. The telephone company records of Jordan's Oklahoma City number show that he called Jones' numbers in Fort Worth three times on Novmeber 17 and again three times on November 23. The record reflects that Jordan had known Jones casually for about two years, but that their only prior transaction was Jordan's purchase of a pick-up truck on November 9, and it does not reflect any innocent reason for these frequent calls in the planning stages and just prior to the theft of the tractor in Oklahoma City. In the absence of any other reason suggested by the record, these frequent telephone

calls to Jones by Jordan, a comparative stranger, immediately prior to the theft are by numbers (and disregarding their content as portrayed by the uncorroborated testimony of Jordan) sufficiently corroborative of Jordan's testimony to take the present facts out of the Williamson-Tillery plain error situation, where indeed the defendant was totally unconnected with the criminal enterprise except by the testimony of an accomplice shown to be of suspect reliability as to the accused's conduct or as to the content of conversations between him and the accused.

Conclusion

We therefore do not find that the factual circumstances before us indicate such unreliability and lack of corroboration that substantial injustice may have resulted from the district court's failure, in the absence of request, to give a cautionary accomplice instruction. While it may have been preferable to have done so, and while it would have been reversible not to have done so if requested, we cannot say that under the circumstances the instructions as a whole did not adequately instruct the jury to weigh with great caution the truthfulness of the accomplice's testimony. Accordingly, we AFFIRM the convictions.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1275

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HORACE CLIFTON JONES,

a/k/a Buster Jones,

Defendant-Appellant

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Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(May 18, 1982)

Before WISDOM, POLITZ and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge TATE